

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DR. MARKCUS KITCHENS, JR.,

Plaintiff,

v.

NATIONAL BOARD OF MEDICAL
EXAMINERS,

Defendants.

Civil Action No. 2:22-CV-03301-JFM

DECLARATION OF ERIN CONVERY

I, Erin Convery, declare as follows:

1. I am over eighteen (18) years of age and, unless indicated otherwise, I have personal knowledge of the facts stated below based on my employment at the National Board of Medical Examiners (“NBME”) and/or my review of NBME records maintained in the ordinary course of business.

2. I am the Director of Disability Services. In that role I oversee the day-to-day operations of the unit including development and implementation of policies and procedures related to the provision of accommodations and services to examinees taking USMLE.

3. The NBME is a not-for-profit organization located in Philadelphia, Pennsylvania that provides assessment services for physicians and other health professions. Its mission is to help protect the health of the public by developing and administering state-of-the-art assessments for evaluating the knowledge and skills of health professionals.

4. Together with the Federation of State Medical Boards, the NBME sponsors the United States Medical Licensing Examination (“USMLE”), which is a standardized examination

used to evaluate applicants' competence for medical licensure in the United States and its territories. The USMLE is designed to assess a physician's ability to apply knowledge, concepts, and principles, and to demonstrate fundamental patient-centered skills, that constitute the basis of safe and effective patient care.

5. Medical licensing authorities across the country rely upon the USMLE as part of their licensure process for ensuring the qualifications of prospective physicians.

6. There are three "Steps" to the USMLE, all of which must be passed before an individual with a medical degree is eligible to apply for an unrestricted license to practice medicine in the United States.

a. Step 1 is a one-day, computer-based multiple-choice examination that assesses whether the examinee understands and can apply important concepts of the sciences basic to the practice of medicine, with special emphasis on principles and mechanisms underlying health, disease, and modes of therapy. It ensures mastery of not only the sciences that provide a foundation for the safe and competent practice of medicine in the present, but also the scientific principles required for maintenance and competence through lifelong learning.

b. Step 2 Clinical Knowledge (Step 2 CK) is a one-day, computer-based multiple-choice examination that assesses an examinee's ability to apply medical knowledge, skills, and understanding of clinical science for the provision of patient care under supervision and includes emphasis on health promotion and disease prevention. Step 2 CK ensures that due attention is devoted to principles of clinical sciences and basic patient-centered skills that provide the foundation for the safe and competent practice of medicine under supervision.

c. Step 3 is a two-day, computer-based examination that assesses whether examinees can apply medical knowledge and understanding of biomedical and clinical science essential for the unsupervised practice of medicine, with emphasis on patient management in ambulatory settings. It is the final examination in the USMLE sequence leading to a license to practice medicine without supervision. Examinees are not eligible to take Step 3 until they have obtained passing scores on Step 1 and Step 2 CK. The USMLE program also recommends that, for Step 3 eligibility, applicants should have completed, or be near completion of, at least one postgraduate training year in an accredited US graduate medical education program that meets state board licensing requirements.

7. The USMLE is administered under standard conditions. Examinees take the USMLE Step examinations under the same testing conditions, including standard testing time, and NBME has policies and procedures in place that are intended to help ensure that no examinee or group of examinees receives unfair advantage on the examination. There is an exception to this policy, however, for individuals with documented disabilities who demonstrate that they need accommodations to access the examination(s).

8. Test accommodations are available on the USMLE for examinees with a disability, as defined under the Americans with Disabilities Act (“ADA”). All requests for accommodations are individually reviewed and, when warranted (*i.e.*, when the examinee demonstrates that he or she is disabled within the meaning of the ADA and needs accommodations to take the examination in an accessible manner), appropriate accommodations are provided.

9. USMLE Step examinations are offered throughout the year, and requests for test accommodations are received throughout the year. Between December 1, 2021 and November 30,

2022, NBME processed approximately 2,500 requests for accommodations on Step 1, Step 2 CK, and Step 3 of the USMLE, and the majority of those requests were granted in whole or in part.

10. Accommodations are denied when the submitted documentation fails to demonstrate that the examinee has a disability within the meaning of the ADA. NBME denies requests for extra testing time or other accommodations that have not been shown to be warranted to ensure that its testing program is fair for all examinees, and to protect the integrity of USMLE scores.

11. Test accommodation requests are typically reviewed by one or more doctoral-level psychologists or medical professionals, depending on the basis of the request. Some requests are also reviewed, at NBME's request, by external professionals.

12. Dr. Kitchen's request for accommodations was reviewed by Lucia McGeehan, Ph.D. Dr. McGeehan is the Manager of Examinee Accommodations in NBME's Disability Services group. She has a Ph.D. in Educational Psychology with a focus in School Psychology. She has been certified as a Nationally Certified School Psychologist by the National Association of School Psychologists and she is a licensed psychologist in the State of Pennsylvania.

13. The USMLE website provides examinees with information about the test accommodation process on its website (<https://www.usmle.org/step-exams/test-accommodations>). A true and correct copy of this landing page is attached at **Exhibit 1**. The USMLE website informs examinees to review the Guidelines carefully and to share the Guidelines with the professionals who will be helping the examinee prepare their documentation. A true and correct copy of the Guidelines (with relevant information expanded) is attached at **Exhibit 2**.

14. For those examinees who received accommodations in medical school, NBME's accommodation request form asks the examinee to identify all accommodations they received in

medical school, *see Exhibit 3* at 4, and there is a separate NBME form which examinees are asked to have completed by their medical school, *see Exhibit 13*.

15. Other information on the USMLE website provides more information to examinees regarding test accommodations, including answers to frequently asked questions regarding test accommodations.

16. Dr. Kitchens completed his first Step 1 registration in September 2021 and chose a testing eligibility period of September 1, 2021-November 30, 2021, but he did not register for an examination and thus his eligibility period expired without Dr. Kitchens testing.

17. On or about January 5, 2022, NBME received the initial request for test accommodations from Markus Kitchens. Dr. Kitchens sought 100% additional test time (double time) on the USMLE Step 1 exam, which would be administered over two days instead of one. He requested accommodations based on reported diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHD) and Test Anxiety. A true and correct copy of Dr. Kitchens' accommodation request form dated October 13, 2021, is attached at **Exhibit 3**.

18. Although Dr. Kitchens's request form is dated October 13, 2021, NBME did not receive the accommodation request from Dr. Kitchens until January 5, 2022. A true and correct copy of an email string showing Dr. Kitchens's January 5, 2022 submission is attached at **Exhibit 4**. A true and correct copy of an email string showing NBME's January 6, 2022, email to Dr. Kitchens confirming receipt and requesting additional information and Dr. Kitchens's January 8, 2022 response, is attached at **Exhibit 5**.

19. Dr. Kitchens's January 5, 2022, request included the following documentation:

- a. An undated letter addressed “To Whom It May Concern,” which we understood to be Dr. Kitchens’ personal statement. A true and correct copy of this letter is attached at **Exhibit 6**.
 - b. A letter from Ghori S. Khan, MD, at Northwestern Medicine dated April 22, 2020. A true and correct copy of this letter is attached at **Exhibit 7**.
 - c. Page 9 of an Office Visit in NM Dermatology summary from October 5, 2020. A true and correct copy of this page is attached at **Exhibit 8**.
 - d. Pages 3 and 4 of a May 25, 2018 medical record signed by Vicki Hackman, M.D. A true and correct copy of these pages is attached at **Exhibit 9**.
 - e. Pages 1 and 2 of a July 26, 2017 office visit summary signed by Vicki Hackman, M.D. A true and correct copy of these pages is attached at **Exhibit 10**.
 - f. A Prometric appointment confirmation dated October 27, 2020. A true and correct copy of this document is attached at **Exhibit 11**.
20. As shown in **Exhibit 5** (January 6, 2022 email from NBME), NBME sought additional information from Dr. Kitchens after initially reviewing his request. NBME sought the following information:
- a. A USMLE Certification of Prior Test Accommodations (CPTA) from an appropriate official at Dr. Kitchen’s medical school. Examinees are informed on the USMLE website to submit a CPTA if they received test accommodations in medical school or in their residency (<https://www.usmle.org/step-exams/test-accommodations/forms>). The CPTA form is available online, and a true and correct copy of the form is

attached at **Exhibit 13**. Because Dr. Kitchens submitted a document showing that he received Extended Time on the Comprehensive Basic Science Exam (CBSE), we asked for him to provide a CPTA form from his medical school. (Medical schools, not NBME, review and decide requests for accommodations on subject examinations like the CBSE.) The CPTA form would inform NBME of any accommodations provided by the medical school and the medical school's reason for providing the accommodations.

- b. A copy of his Medical College Admission Test (MCAT) score reports.
- c. A copy of his Comprehensive Basic Science Exams (CBSE) score report.
- d. A comprehensive report of evaluation for his ADHD diagnosis, if he had had any formal neuropsychological or psychoeducational testing done. The NBME Senior Disability Services Specialist advised Dr. Kitchens: "If you have not already done so, I strongly encourage you to review the USMLE Guidelines to Request Test Accommodations, which include specific guidelines for requesting on the basis of ADHD, and page 1 of the USMLE Request for Test Accommodations form for information on how to document a functional impairment."
- e. A report of evaluation or treatment summary for his Anxiety diagnosis.

21. Dr. Kitchens's response to NBME's January 6, 2022 request is shown at **Exhibit 5**. The only additional documentation he provided was a copy of his score report for the December 10, 2020 administration of the CBSE. A true and correct copy of that report is attached at **Exhibit 12**.

22. NBME thoroughly reviewed the documents submitted by Dr. Kitchens. Following its individualized review of Dr. Kitchens's request, NBME concluded that his documentation did not demonstrate that his requested accommodations were warranted. NBME therefore denied Dr. Kitchens's request. A true and correct copy of NBME's February 8, 2022 decision letter to Dr. Kitchens is attached at **Exhibit 14**.

23. Dr. Kitchens took the Step 1 examination under standard conditions on February 25, 2022 and failed. He took the Step 1 examination again on May 9, 2022, without requesting accommodations, and failed.

24. Dr. Kitchens took the Step 2 CK examination on May 28, 2022 and June 29, 2022 under standard conditions and failed. Dr. Kitchens did not submit a request for accommodations on the Step 2 CK examination to NBME.

25. NBME received a new accommodation request from Dr. Kitchens on August 30, 2022. In this request, Dr. Kitchens sought 50% additional time (time and 1/2) and additional break time over two days of testing. A true and correct copy of Dr. Kitchens's August 30, 2022 request and supporting documentation is attached at **Exhibit 15**.

26. After an initial review of Dr. Kitchens's new request, an NBME Disability Services Specialist emailed Dr. Kitchens and informed him that he needed to provide new documentation (i.e., documentation that NBME had not already reviewed) to support his request for accommodations. A true and correct copy of NBME's August 30, 2022 email to Dr. Kitchens is attached at **Exhibit 16**.

27. A true and correct copy of Dr. Kitchens's August 30, 2022 response to this email is attached at **Exhibit 17**.

28. NBME reached out to Dr. Kitchens again on September 2, 2022. A true and correct copy of NBME's September 2, 2022 email to Dr. Kitchens is attached at **Exhibit 18**. A true and correct copy of Dr. Kitchens's September 7, 2022 email response is attached at **Exhibit 19**.

29. Dr. Kitchens took the Step 1 examination again on September 29, 2022, and did not pass.

30. USMLE informs examinees in the Bulletin of Information that test score results are typically available two to four weeks after their test date, but a number of factors may delay score reporting so examinees should allow at least eight weeks to receive notification that their score report is available.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 2023.



Erin Convery